

ISSUES

- (1) What is the nature and extent of injury and disability?
- (2) What is the liability of the Kansas Workers Compensation Fund?
- (3) Is claimant entitled to future medical expense?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record and the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) Claimant, on account of his injuries, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment and is entitled to temporary total disability compensation until such time as he is found to have reached maximum medical improvement or until further order of the Director.

Claimant, a veterinarian's helper for the respondent, suffered several minor injuries which resulted in severe infections requiring surgery, skin grafting, long periods of antibiotics and lengthy hospital stays. The injury in question occurred on July 9, 1990, when, in the process of giving an animal a vitamin B shot, claimant was stabbed in the left arm with the needle. This arm became infected and claimant was hospitalized for seven (7) days.

After treatment by several physicians and several attempts to return to work, claimant was diagnosed as having reflex sympathetic dystrophy (RSD). He started vocational rehabilitation retraining on May 22, 1991, but had difficulty completing same due to his ongoing physical problems. Claimant continued to suffer pain, tingling, numbness, sweating and cramps in his arms and upper chest and also in the back of his neck. While claimant was capable of concluding his vocational rehabilitation training, he has been unable to hold a job due to his ongoing physical problems.

In January 1993 claimant was hospitalized at St. Joseph's Hospital in Wichita, Kansas, with symptoms of pain, depression and potentially suicidal tendencies. Claimant was referred by Dr. Eustaquio O. Abay, a Wichita neurosurgeon who was the treating physician at that time, to Dr. Kaye Freeman Zwiacher, a psychiatrist in Wichita, Kansas. Dr. Zwiacher confirmed the diagnosis of RSD which she described as a phenomenon where an injury to a limb causes constriction of the nervous system sending messages back to the brain associated with pain even though there is no justification or reason for the pain. No active disease process is involved although there might be some type of scarring which impinges on the nerves, causing the nerves to misfire. Claimant had no symptoms of RSD before his employment with respondent. Dr. Zwiacher opined that the pain can be constant and uncontrollable, creating depression and prohibiting people from functioning on a normal, everyday basis. RSD can develop into a major depression. She expressed concern that if claimant quit taking his medication, as he did in January 1993, he could again become severely depressed and potentially suicidal. While claimant appears to desire to function in a normal capacity, Dr. Zwiacher sees him as being one-hundred percent (100%) disabled from the workplace.

People do not acquire RSD until they have suffered an injury although they may have a tendency towards it. Dr. Zwiacher opined that once you develop RSD on more than one occasion this may indicate a predisposition to develop RSD. Trauma is believed to be required to cause RSD although the medical community is still not totally sure as to what actually does cause the condition.

Certain personality types are predisposed to RSD including people with dependent personalities and insecure people both of which are traits exhibited by the claimant. Dr. Zwiacher also noted that just because a person develops RSD on the right side does not necessarily mean that person will have RSD on the left. The situations are independent of each other and each individual event brings its own possible RSD situation.

She expressed concern at the diagnosis of Dr. Duane Murphy regarding his opinion that claimant suffered from major depression, recurrent, severe, without psychotic features and personality disorder. This diagnosis was not the same as hers which was major depression, severe, with psychological factors affecting physical illness. Dr. Murphy's notes indicated a more significant psychological factor than she diagnosed which could indicate claimant's condition is worsening, and may require more hospitalization.

Claimant was examined and treated by Dr. Abay over a period of several years. Initially Dr. Abay felt the condition would improve and claimant would be capable of returning to work. He released claimant to go back to work on several occasions, none successfully. His treatment included several ganglion blocks which failed to improve claimant's condition. Claimant requested additional treatment and a dorsal sympathectomy at T2, T3 was done on the right side on November 25, 1991, and on the left side on December 18, 1991. The doctor felt claimant had good results from both surgeries. As of late June 1992, he felt claimant would be capable of returning to very physical labor. He was not aware of what occurred between June 1992 and February 1993, when claimant was hospitalized at St. Joseph's Hospital in the psychiatric ward. As of February 1993, he felt claimant was again temporarily totally disabled and he had no way to anticipate how long this long-term disability would continue. He did opine that while he is not aware of what could cause the situation to improve, sometimes people will spontaneously improve for no apparent reason.

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

The Appeals Board finds the preponderance of the credible medical evidence in this case indicates claimant continues to suffer from RSD with the condition being temporary. Temporary total disability payments are awarded and will continue until such time as claimant is found by competent medical evidence to have reached maximum medical improvement or until further order.

- (2) The Kansas Workers Compensation Fund has no liability in this matter.

In order for the respondent to be relieved of liability for compensation awarded or to be entitled to an apportionment of the award from the Kansas Workers Compensation Fund, the respondent has the burden to prove that it knowingly employed or retained a handicapped employee. K.S.A. 44-567. A handicapped employee is one afflicted with or subject to any physical or mental impairment or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining or retaining employment. K.S.A. 44-556(b).

K.S.A. 44-567(a)(1) states:

“Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers' compensation fund.

(2) Subject to the other provisions of the workers compensation act, whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director finds the injury probably or most likely would have been sustained or suffered without regard to the employee's preexisting physical or mental impairment but the resulting disability or death was contributed to by the preexisting impairment, the director shall determine in a manner which is equitable and reasonable the amount of disability and proportion of the cost of award which is attributable to the employee's preexisting physical or mental impairment, and the amount so found shall be paid from the workers' compensation fund.”

The purpose of the Workers Compensation Fund is to encourage employment of persons handicapped as a result of specific impairments by relieving employers, wholly or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. K.S.A. 44-567(a); Morgan v. Inter-collegiate Press, 4 Kan. App. 2d 319, 606 P.2d 479 (1980); Blevins v. Buildex, Inc., 219 Kan. 485, 548 P.2d 765 (1976).

Liability will be assessed against the Workers Compensation Fund when an employer shows that it knowingly hired or retained a handicapped employee who subsequently suffered a compensable work-related injury. An employee is handicapped under the Act if the employee is “afflicted with an impairment of such a character as to constitute a handicap in obtaining or retaining employment.” Carter v. Kansas Gas & Electric Co., 5 Kan. App. 2d 602, 621 P.2d 448 (1980).

The employer has the burden of proving it knowingly hired or retained a handicapped employee. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

Dr. Zwiacher opined that while a person who has had several episodes of RSD in all likelihood has a propensity to develop same in the future, a person with RSD on the right arm may not necessarily develop RSD on the left arm. Trauma is required to cause RSD and the medical community is not certain as to the association between the trauma and the RSD. Development of RSD in different parts of the body are situations independent of each other and each individual event brings its own traumatic RSD.

The respondent has been unable to provide medical evidence to show that claimant's preexisting RSD contributed to or caused the later RSD conditions to develop. There is also no evidence to show that "but for" this preexisting development of RSD the later RSD would not have developed. In fact, medical evidence is directly contrary, finding that each development of RSD is an independent incident all to its own.

The Appeals Board finds the respondent has been unable to sustain its burden of proving that it knowingly hired or retained a handicapped employee. The respondent also has been unable to prove the claimant's injury of July 9, 1990, would not have occurred but for the preexisting condition and further has been unable to prove any contribution to the July 9, 1990, injury from the preexisting RSD. As such, the Workers Compensation Fund has no liability in this matter.

(3) Claimant is entitled to future medical treatment for psychological and physical difficulties resulting from the injury to his left arm on July 9, 1990, and the RSD which developed therefrom. Both Dr. Zwiacher and Dr. Abay agree that claimant will be in need of medical care and psychiatric care in the future as a result of his ongoing problems.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Thomas F. Richardson, dated March 10, 1994, shall be and is affirmed in part and modified in part and claimant is awarded temporary total disability compensation at the rate of \$229.67 per week until having been found to have reached maximum medical improvement or until further order of the Director.

As of August 29, 1994, claimant would be entitled to 216.14 weeks temporary total disability at the rate of \$229.67 per week totalling \$49,640.87 due and ordered paid in one lump sum less amounts previously paid. Thereafter, claimant is entitled to 198.86 weeks temporary total disability at the rate of \$229.67 per week for a sum of \$45,672.18 until fully paid or until further order of the director.

Claimant's contract of employment with his attorney is approved subject to the provisions of K.S.A. 44-536.

The Kansas Workers Compensation Fund shall bear no responsibility for this award but shall be responsible for its own attorney's fees.

Claimant is entitled to future medical upon proper application to and approval by the Director of Workers Compensation for the treatment of his reflex sympathetic dystrophy to the left arm and the psychiatric problems associated with same. Future medical treatment for claimant's Horner's syndrome in his right eye is denied.

Fees and expenses of the administration of the Kansas Workers Compensation Act are assessed against the respondent and insurance carrier to be paid as follows:

Underwood & Shane Preliminary Hearing	\$99.90
Tri-State Reporting Service Preliminary Hearing	\$330.20

Tri-State Reporting Service Regular Hearing	\$490.05
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Barber & Associates Deposition of Dr. Zwiacher	\$415.60
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Barber & Associates Deposition of Dr. Abay	\$376.00
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IT IS SO ORDERED.

Dated this ____ day of September, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Henry Goertz, 100 Military Plaza, Suite 206, Dodge City, KS 67801
Jim D. Mills, PO Box 439, Garden City, KS 67846
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Thomas F. Richardson, Administrative Law Judge
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